Filed 11/30/16 P. v. Lagarde CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JACOB LAGARDE, Defendant and Appellant.	B266861 (Los Angeles County Super. Ct. No. NA093763)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Affirmed.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Jacob Timothy Lagarde threw a Molotov cocktail at a man he did not know. A jury found him guilty of deliberate, premeditated attempted murder, explosion of a destructive device with intent to kill, explosion of a destructive device causing great bodily injury, arson of a structure, and two counts of arson of property. Lagarde admitted certain prior conviction allegations. The court sentenced Lagarde to a total term of 39 years 8 months to life. Lagarde appeals, contending the evidence of intent to kill and of deliberation was insufficient, and a one-year enhancement for a prior prison term should have been stricken, not stayed. We affirm.

BACKGROUND

Lagarde was arrested in Long Beach on October 18, 2012, and released on the afternoon of October 19. Around 6:15 p.m., Lagarde entered the El Paisano Ranch Market, several blocks from the jail. As shown on surveillance video, he went to the beer refrigerator, took a bottle of beer, and put it in his pants under his shirt. He left the market and poured the beer out onto the ground in the parking lot.

Less than five minutes later, surveillance video showed Lagarde arriving at a gas station a couple of blocks away. He entered the gas station market, carrying the beer bottle under his arm. He asked the cashier to open a pump so he could pump gas into the bottle. The cashier told him he could not do that. Lagarde left, but returned shortly thereafter with a red plastic gas container he had gotten from another customer. He paid in cash, and the cashier opened a pump for him. He pumped gas into the plastic container with the other man's help. A passing driver who parked across the street from the gas station thought she saw Lagarde and another man pumping gas into a glass bottle and called 911.

A short time later, Lagarde returned to the El Paisano Ranch Market and stood outside it, near a palm tree and alley. Around the same time, Raul Mendieta came to the market with his father, and the two sat outside the entrance. After several minutes passed, Mendieta's father went inside the market, while Mendieta continued to sit outside the door, next to a wooden box.

Bertha Angelina Salcedo, Mendieta's neighbor, went to the market with her husband that evening, and waited outside while he went inside to shop. She spoke with Mendieta as she waited. A woman with a baby stroller stood nearby.

As Salcedo talked to Mendieta, she noticed a man standing by a palm tree next to an alley to their right, laughing and pointing at them repeatedly. She identified the man as Lagarde. Mendieta told her Lagarde had been standing there for a while. They watched as Lagarde walked toward them, got a newspaper from a bin at the side of the store and rolled it in his hand, and then pointed at them and laughed.

Lagarde walked back toward the palm tree with the rolled newspaper. He leaned down and grabbed a 40-ounce beer bottle, twisted the newspaper and put it in the bottle, and shook the bottle. He walked back toward Salcedo and Mendieta, lighting the paper on fire as he approached them. When he was a few feet from them, he threw the bottle at Mendieta. It struck Mendieta's face, toward his shoulder, and then hit the wall and broke. There was an explosion of flames. Mendieta immediately caught on fire. The fire also ignited the wooden box and a baby blanket in the stroller. Lagarde pushed past Salcedo and ran away. Mendieta, engulfed in flames, ran into the parking lot and then fell. Other people went over to him to help put out the fire.

Paramedics took Mendieta to the hospital, where he stayed for approximately seven months. He suffered burns to his whole body and was in a coma while he underwent several surgeries. At the time of trial in 2015, some scars remained, and he still needed treatment.

After the incident, a Long Beach Fire Department arson investigator investigated the scene, observing fire debris and a burn area about five feet in diameter at the side of the market. She found pieces of a broken bottle, including a partially intact glass bottle neck with a burned and charred piece of paper that had been twisted up and shoved in the bottle.

The investigator testified that a Molotov cocktail is a destructive device consisting of three elements: a breakable container, a flammable liquid, and a wick, usually a piece of paper or a rag. When the wick is lit on fire and the container hits a hard surface and breaks, the liquid and vapors are released into the air and explode, like a "giant fireball." She testified that a glass beer bottle with gasoline in it and a twisted newspaper shoved into the neck, shaken and lit, would qualify as a destructive device or Molotov cocktail.

After Lagarde's arrest, a Long Beach homicide detective placed Lagarde in a jail cell with another inmate and recorded their conversation. The recording was admitted as a trial exhibit. In it, Lagarde said he did not know and had no "beef" with Mendieta. He said he saw him "chillin," noting, "That's just how I'm wired." He continued, "I'm not saying I'm crazy fool but, I just wanted to see some dustup fool. . . . I just wanted, I just wanted to, you know, light a dude on fire dog, you know what I mean?" and said he did it "just to do it, dog." He told the inmate he put gas in a bottle and then saw Mendieta, saying, "I just picked him out, you know what I mean? I knew I was going to do, I just to looking for somebody [*sic*] and then I just decided on him." The inmate asked him about video evidence that Lagarde had been at

the gas station. Lagarde commented, "They're saying they got me . . . going to a gas station and buying gas. They showed me a picture. No tattoos, nothing. . . . That don't look like me. . . . Well, I have tattoos but it looks different from this guy so I'm not gonna say that's me. So they're like, 'Oh you did this.' And I'm like nah man, even if I did don't mean anything when you're showing me pictures of this guy and that's not me, you know? That's, that's basically it, dog. Know what I mean? So, to me, that's not attempted murder. That shit, like they hit me with, bam. So I was like, oh man."

Lagarde went to trial in 2015. The jury found him guilty of deliberate and premeditated attempted murder (Pen. Code, §§ 664, 187, subd. (a), 189);[1] explosion with intent to murder (§ 18745); explosion causing mayhem or great bodily injury (§ 18755, subd. (b)); arson of a structure (§ 451, subd. (c)); and two counts of arson of property for the burned wooden box and baby blanket (§ 451, subd. (b)). At sentencing, Lagarde admitted prior convictions and prison terms for various sentence enhancements. The trial court imposed a total sentence of 39 years 8 months to life, including enhancements for personal use of a dangerous weapon (§ 12022, subd. (b)), infliction of great bodily injury (§ 12022.7), a prior serious felony (§ 667, subd. (a)), and two prior prison terms (§ 667.5, subd. (b)).[2] The court stayed a third prior prison term enhancement based on the same prior conviction as the prior serious felony enhancement.

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[1] Undesignated statutory references are to the Penal Code.

[2] The court stayed sentences of life with the possibility of parole for counts 2 (§ 18745) and 3 (§ 18755, subd. (b)) pursuant to section 654. The court concluded section 654 did not bar punishment for the arson counts, which had separate victims.

DISCUSSION

I. Intent to Kill

Lagarde argues there was no substantial evidence of intent to kill for attempted murder (count 1) or the section 18745 offense (count 2).

"On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078.) We presume the existence of every fact the jury could reasonably deduce and make all reasonable inferences that support the judgment. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Catlin* (2001) 26 Cal.4th 81, 139.) The "direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact." (Evid. Code, § 411.) "We do not reevaluate witness credibility nor do we reweigh the evidence. [Citation.] The same standard of review applies to prosecutions relying upon circumstantial evidence." (*People v. Ramos* (2011) 193 Cal.App.4th 43, 53.)

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) Specific intent to kill is also required for an offense under section 18745, igniting or exploding a destructive device or explosive with intent to commit murder. (§ 18745; CALCRIM No. 2576.)

Because there is rarely direct evidence of specific intent, it must usually be shown from the circumstances of the crime. (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946.) Although evidence of motive may demonstrate intent to kill, such evidence is not required. (*People v. Smith*

(2005) 37 Cal.4th 733, 742.) The fact that an attempt was not successful does not establish a defendant acted without the intent to kill. (*Ibid.*) A defendant's flight from the crime scene can evidence intent to kill. (See *People v. Moon* (2005) 37 Cal.4th 1, 28; *People v. Mason* (1991) 52 Cal.3d 909, 941.)

The facts presented to the jury include the following: Lagarde later stated that on the day of the incident, he wanted to "light a dude on fire," and he picked out Mendieta. He observed Mendieta for some time, laughing and pointing at him. Both before that and afterward, Lagarde took several steps to create a Molotov cocktail. After he finished the Molotov cocktail, he approached Mendieta, sitting against the market wall, lit the device, and threw it at him. Then he ran from the scene. Mendieta suffered burns to his whole body, and was in the hospital for several months, requiring several surgeries. Viewing the record as a whole, and making all reasonable inferences, we conclude a reasonable jury could find from these facts that Lagarde intended to kill Mendieta.

Lagarde argues these facts show not an intent to kill, but only an intent to inflict great bodily injury. We disagree.

First, Lagarde points to his statements during the jail cell conversation, including that he wanted to "light a dude on fire," he did it "just to do it," and to him, what he did was "not attempted murder." The verdict demonstrates that the jury rejected Lagarde's jail cell statements as showing he lacked an intent to kill. Lagarde's statement that it was "not attempted murder" immediately followed him denying that the surveillance video at the gas station identified him, and thus appears aimed at whether the prosecution could prove a case against him rather than at his actual state of mind. Even if that statement were taken as showing a lack of intent to kill,

as long as there is substantial evidence to support the inference that Lagarde harbored that intent—as we conclude there was—the jury may discount evidence to the contrary. (See *People v. Moore* (2002) 96 Cal.App.4th 1105, 1114 [defendant testified he wanted to stab his victim but did not intend to kill her; the court nonetheless concluded evidence of the nature of the crime showed an intent to kill].)

Lagarde also argues that the use of a destructive device cannot alone show intent to kill because other offenses exist for the use of a destructive device that do not require an intent to kill: use of a destructive device with intent to injure (§ 18740), and use of a destructive device causing great bodily injury (§ 18755). However, the statutes defining offenses for the use of destructive devices proscribe a range of conduct falling within the statutory scope. For example, one might throw a Molotov cocktail into a building without throwing it directly at a person, supporting a conviction for a lesser offense related to the use of a destructive device without also supporting a conviction for an offense requiring the specific intent to kill. (See, e.g., *People v. Godwin* (1995) 31 Cal.App.4th 1112, 1118 [concluding precursor to section 18740 was meant to punish possession or ignition of a destructive device or explosive that was intended to intimidate other people or injure them or their property].) Here, Lagarde threw a Molotov cocktail directly at Mendieta, striking him. That specific conduct allows an inference of an intent to kill Mendieta.

Lagarde further argues that to establish attempted murder required proof that he had a specific desire to kill Mendieta, but the evidence showed only implied malice, and additional facts were required to show an intent to kill. Lagarde relies on *People v. Belton* (1980) 105 Cal.App.3d 376, 380-381, in which the court concluded there was "a dearth of evidence to establish that

defendant set the fires with an intent to murder" his victim. But in that case, the defendant set fire to a building, not a person. Here, the jury could reasonably infer from Lagarde's setting Mendieta on fire with a Molotov cocktail that he desired to kill Mendieta. No additional facts were required to support that inference.

Accordingly, we reject Lagarde's arguments that the evidence was insufficient to support the jury's finding that Lagarde intended to kill Mendieta.

II. Deliberation

Lagarde argues there was no substantial evidence to support the finding of deliberation for attempted murder (count 1). He contends his exploding the Molotov cocktail at Mendieta is insufficient to prove deliberation because the evidence showed only a plan to explode the device, not to kill, and did not show substantially more reflection than is involved in forming a specific intent to kill. As above, we review for substantial evidence from which a reasonable trier of fact could find the requisite deliberation, and we conclude the evidence sufficed. (See *People v. Koontz*, *supra*, 27 Cal.4th at p. 1078.)

The crime of murder is divided into degrees. First degree murder includes murder that is perpetrated by any kind of willful, deliberated, and premeditated killing. (§ 189.) The crime of attempted murder is not divided into degrees, but if the attempted murder is willful, deliberate, and premeditated, enhanced punishment may be imposed. (§ 664, subd. (a); *People v. Smith*, *supra*, 37 Cal.4th at p. 740.) The word "willful" means intentional. (*People v. Moon*, *supra*, 37 Cal.4th at p. 29.) "'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.] 'The process of

premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection."" (*People v. Koontz*, *supra*, 27 Cal.4th at p. 1080.)

Three types of evidence that typically support a finding of premeditation and deliberation are planning activity, motive, and a manner of killing from which a preconceived plan could be inferred. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) These categories provide a framework to assess whether the evidence supports an inference that a murder or attempted murder was the result of preexisting reflection and weighing of considerations, rather than an unconsidered or rash impulse. (*People v. Koontz*, *supra*, 27 Cal.4th at p. 1081.) These are not exclusive categories, and not all three categories of evidence must be present. (*Ibid.*; *People v. Anderson*, *supra*, 70 Cal.2d at p. 27.)

The record shows significant evidence of deliberation and premeditation. Lagarde completed several steps over an extended period of time to complete the act: He obtained a bottle at one location and immediately emptied it out. He went to a second location to obtain gasoline to put in the bottle. He retrieved newspaper to use as a wick, and assembled a Molotov cocktail. He approached the victim, and then lit and threw the device. There is also evidence that Lagarde selected Mendieta as his victim in advance: He stayed near the market, watching Mendieta and Salcedo, pointing and laughing, as he completed the steps of constructing the Molotov cocktail. Considering all of these facts, there is extremely strong evidence of planning, and thus of "substantially more reflection" than needed to prove intent to kill. (*People v. Boatman* (2013) 221 Cal.App.4th 1253, 1262.)

The planning evidence alone would suffice for a finding of deliberation and premeditation. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 27.) But more

evidence existed here. The prosecution also presented Lagarde's statements after the crime, including that he wanted to "light a dude on fire"—evidence of a motive despite Lagarde having no prior relationship with Mendieta. Moreover, Lagarde used a Molotov cocktail, a destructive device of a nature "fundamentally different from ordinary weapons" because of their "inherently dangerous nature." (*People v. DeGuzman* (2003) 113 Cal.App.4th 538, 546-547; see § 16460, subd. (a)(5).) Further, Lagarde threw the Molotov cocktail at Mendieta's head, in an attack likely to cause critical burns. This evidence of the manner of the offense implies the act was "deliberately calculated to result in death." (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 33-34.)

Viewing the evidence as a whole, we conclude there was substantial evidence from which the jury could find Lagarde acted with deliberation and premeditation. (Cf. *People v. Martinez* (1952) 38 Cal.2d 556, 561.)

Lagarde argues the facts show only a plan to explode a destructive device, but not a plan to kill. We have already rejected similar reasoning regarding the jury's finding of an intent to kill for counts 1 and 2. The evidence allows an inference that Lagarde acted with an intent to kill, not just to explode a Molotov cocktail and inflict injury. The evidence of his extensive planning to carry out that act of violence, as well as the evidence of his picking out Mendieta and laughing at him while contemplating the act, was substantial evidence of a deliberate and premeditated intent to kill him. (Cf. *People v. Streeter* (2012) 54 Cal.4th 205, 242-244.)

III. Prior Prison Term Enhancement

At sentencing, Lagarde admitted prior conviction allegations, including a conviction and a prison term for a robbery offense under section 211. The trial court imposed a five-year enhancement for that conviction as a prior serious felony pursuant to section 667, subdivision (a), and stayed a one-year

enhancement for the prior prison term for that offense pursuant to section 667.5, subdivision (b).[3]

Lagarde argues the prior prison term enhancement based on the robbery conviction should have been stricken rather than stayed, because once a prior prison term is found true, the enhancement is mandatory unless stricken. We conclude the trial court correctly stayed execution of the one-year enhancement.

In *People v. Jones* (1993) 5 Cal.4th 1142, 1149-1150, our Supreme Court interpreted section 667, enacted in 1982 as part of Proposition 8, to provide that "when multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply." On that basis, the Court concluded a one-year enhancement under section 667.5, subdivision (b), based on a prior kidnapping offense was precluded because that offense permitted a five-year enhancement under section 667, subdivision (a). (*Id.* at pp. 1152-1153.) The court ordered the one-year enhancement stricken, without discussing whether striking that enhancement was the proper remedy. (*Id.* at p. 1153.)

More recently, the Supreme Court has stated, in another situation where only the greatest of multiple available enhancements could be imposed, that the proper procedure was to impose any other, prohibited enhancements but stay their execution. (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1129-1130.) A leading treatise has since observed, "In view of the Supreme Court's treatment of multiple enhancements in *People v. Gonzalez* . . . likely the better practice [where enhancements under both

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[3] The prior conviction also doubled the base sentence for the attempted murder count under the "Three Strikes" law. (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d).)

section 667, subdivision (a), and section 667.5, subdivision (b), are found for the same offense,] is to impose, then stay, any lesser enhancement under the authority of Rule 4.447." (Couzens, et al., Sentencing Cal. Crimes (The Rutter Group 2016) § 12:5; see Cal. Rules of Court, rule 4.447.) This procedure applies to the specific circumstance of an enhancement that is prohibited by law, as distinguished from situations in which a sentencing court discretionarily strikes an enhancement, such as under section 1385. (See *People v. Lopez* (2004) 119 Cal.App.4th 355, 364-365.)

Lagarde cites three cases in support of his assertion that the one-year enhancement under section 667.5, subdivision (b), may not be stayed. But those cases are inapposite to the present circumstances. *People v. Jones* (1992) 8 Cal.App.4th 756, 758 and footnote 1, involved a discretionary decision under former section 1170.1, subdivision (h). *People v. Eberhardt* (1986) 186 Cal.App.3d 1112, 1122-1123, dealt with a separate issue regarding appealability of a stayed enhancement sentence, and stated that "striking the enhancements would have implied a finding that they were unsupportable in the interests of justice or would have required mitigating factors"—discretionary findings not at issue in this case. Lastly, although *People v. Langston* (2004) 33 Cal.4th 1237, 1241, did state that a prior prison term enhancement is mandatory unless it is stricken, the court merely relied on *People v. Jones*, *supra*, 8 Cal.App.4th at page 758, and *People v. Eberhardt*, *supra*, 186 Cal.App.3d at pages 1122-1123, and did not itself consider the question. We thus decline to follow *People v. Langston*.

At sentencing in this case, the trial court stated, "The court stays the prior term on the robbery, case VA078601, because my reading of the law is it can't be imposed." The abstract of judgment reflects the stayed section 667.5, subdivision (b), enhancement. The Supreme Court has observed that courts

often use "imposed" to mean "imposed and then *executed*," and "stayed" to mean "imposed and then *stayed*." (*People v. Gonzalez*, *supra*, 43 Cal.4th at p. 1125.) We take the trial court to have used "stays" and "imposed" in those senses, and to have properly followed the guidance of the Supreme Court and California Rules of Court, rule 4.447, by imposing and then staying execution of sentence for the enhancement under section 667.5, subdivision (b), for the prior robbery prison term.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J.

LUI, J.